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IN THE

SUPREME COURT OF THE UNITED STATES

OCOTBER TERM, 1977

NO. ~~77-5282~~ 77-6536

JOHN CORNELIUS HAMMONS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiciton	1
Questions presented	2
Statutory provisions involved	2
Statement of the case	2
Reasons for granting the writ	4

1. This is a case of first impression. The lower Courts' opinion leaves the application of criminal statute Title 18 U.S.C. Section 922 (h) (1) ambiguous and unclear.
2. The evidence in this instant case supports the defendant's position and the trial court erred in refusing to allow the defendant to raise the defense of an emergency or momentary receipt of a firearm, justified by emergency circumstances.
3. In the decision below, the Court shifted from judging the law to judging the facts, and in so doing misconstrued the facts that were before the trial court.
4. The results of the lower Courts' decisions are unconscionable and unfair.

Conclusion	7
Appendix (Opinion and Judgment of Court of Appeals)	1 (Appen.)
(Notice of Denying Petition)	5 (Appen.)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-5262

JOHN CORNELIUS HAMMONS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner John Cornelius Hammons respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 6, 1978.

OPINION BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Alabama.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 6, 1978. A timely petition for rehearing en banc was denied on March 8, 1978, and this petition was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a defense of emergency or innocent possession may be raised as a defense to a charge of violating 18 U.S.C. Section 922(h)(1), which prevents a convicted felon from receiving a firearm that has been shipped in interstate commerce.

STATUTORY PROVISIONS INVOLVED

The statute involved 18 U.S.C. Section 922(h)(1), which makes it unlawful for a convicted felon to receive any firearm or ammunition which has been shipped or transported in interstate commerce.

STATEMENT OF THE CASE

On August 7, 1973, the Defendant was convicted of interstate transportation of a stolen motor vehicle and sentenced to three concurrent terms of three years imprisonment. On June 10, 1976, the Defendant was with other individuals at a nightclub.

At approximately 3:00 A.M., Hudson Bridges, a friend of the Defendant, entered the club looking for his girlfriend, Pat Townley. When Townley refused to leave the club, Bridges retrieved a pistol from his car, returned to the club and forcefully drug her outside.

The Defendant, at the request of others, and being aware of

Bridges' reputation for violence, followed the couple outside in an effort to keep Bridges from hurting Townley.

The Defendant persuaded Bridges to hand over the gun and reentered the club with the gun still in his possession. Approximately ten minutes later, at a time when the police arrived on the scene, the Defendant attempted to give the gun to a waitress with whom he had been talking. During the exchange, the gun went off shooting the Defendant in the buttocks.

At the close of the evidence, the Defendant requested several jury instructions which charged in essence: (1) that the jury should consider the circumstances surrounding the Defendant's receipt of the gun, and (2) that if the Defendant had gained temporary control of the gun under a reasonable fear for the life and safety of another, the jury should vote for an acquittal. The Court denied the Defendant's request for charges and charged the jury essentially that they were not to consider the reasons why the firearm was received. The Defendant objected and the jury retired.

After deliberating, the jury returned and inquired: (1) whether they could consider the circumstances as to how the Defendant acquired the gun, or (2) strictly by the law. The Court answered, "Strictly by the law".

The jury later returned and indicated that they were unable to reach a verdict. The Court again read its charge relative to the statute and again instructed the jury that they were not to burden themselves in trying to determine why the firearm was received.

The jury returned a verdict of guilty and the Defendant was sentenced to two and one-half years imprisonment.

The Defendant appealed to the Circuit Court of Appeals and the trial court's judgment was affirmed on February 6, 1978. The Defendant then filed a petition for rehearing en banc, which the Fifth Circuit Court of Appeals denied on March 8, 1978. The Defendant now comes to this Court by petition for writ of certiorari to the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. This is a case of first impression. The lower Courts' opinion leaves the application of criminal statute Title 18 U.S.C. Section 922(h)(1) ambiguous and unclear.

This case involved the question of whether a felon may legally take possession of a firearm under an emergency situation, not of his own making, and only in a momentary effort to protect another.

This is a case of first impression and the opinion below served to confuse the question rather than answer it.

The evidence produced at trial was in all essential respects not controverted and squarely presented the Court with a case wherein a convicted felon took possession of a firearm from a drunken, violent individual who was posing an imminent threat to an innocent third party. The evidence was clear that the felon acted only at the request of others and his possession was only momentary.

The opinion below gives the impression that such a defense

as that offered by the Defendant, ie innocent or momentary possession justified by emergency circumstances, may be proper under certain circumstances.

This case involves a criminal statute and its application should be clear and unambiguous in order to serve as a future precedent. This Court has the power and opportunity to settle this question, leaving nothing to speculation.

2. The evidence in this instant case supports the defendant's position and the trial Court erred in refusing to allow the defendant to raise the defense of a emergency or momentary receipt of a firearm, justified by emergency circumstances.

The decision below restated the law that the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility.

The evidence presented by both sides provides a substantail basis for the defendant's requested charges regarding a defense of momentary or innocent receipt of a firearm. The trial Court erred in refusing to give the defendants requested instructions and in instructing the jury that they could not consider the circumstances under which the Defendant took possession of the firearm.

If there is such a defense, this defendant should certainly have been allowed to raise it, in that the evidence is entirely consistent with an innocent or momentary possession justified by emergency circumstances.

3. In the decision below, the Court shifted from judging the law to judging the facts, and in so doing misconstrued the facts that were before the trial Court.

The decision below indicates that the Court erred in its interpretation of the facts. The Court's opinion indicated that the Court felt the facts that: (1) the defendant possessed a gun for ten minutes after the emergency, and (2) a surreptitious transfer by the defendant were not consistent with the theory of justified or innocent receipt of the firearm. Both of these points indicated by the Court as being determinative of the defendant's intent, occurred after the initial receipt of the firearm and do not show his intent at the time he received the firearm. All of the testimony concerning the defendant prior to the receipt of the firearm is consistent with the defendant's suggested defense.

The Court below failed to note that the owner of the gun was still on the premises during the entire time that the defendant retained possession of the firearm, under this circumstance, is entirely reasonable and consistent with his defense.

The fact that the Defendant attempted a surreptitious transfer of the firearm is not inconsistent with the defendant's defense. The defendant was a convicted felon and realized that he could be in trouble with the police for possessing a firearm.

For aught that appears the defendant took possession of the firearm as he states and then became frightened at the arrival of the police.

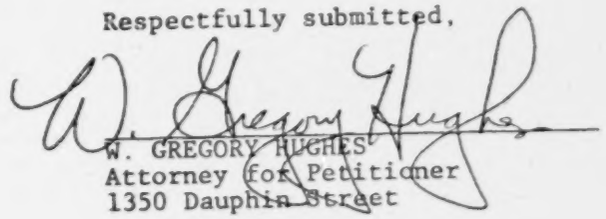
4. The results of the lower Courts' decisions are unconscionable and unfair.

The decision below would punish a convicted felon for preventing death or serious bodily injury to another. Surely Congress could not have intended that the law would be so construed that one could and would be imprisoned for protecting an innocent person from harm by taking momentary possession of a firearm. Under the trial Court's interpretation of the statute and the Court of Appeals' decisions, a felon could be convicted of a violation such as in this case, where the felon disarmed another individual who had assaulted him with a firearm. Such unreasonable and unconscionable results could not have been intended by Congress.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



W. GREGORY HUGHES
Attorney for Petitioner
1350 Dauphin Street

April 5, 1978

UNITED STATES of America, Plaintiff-Appellee,

v.

John Cornelius HAMMONS, Defendant-Appellant.

No. 77-5262.

United States Court of Appeals, Fifth Circuit.

Feb. 6, 1978.

In a prosecution for receipt of a firearm by a convicted felon, the United States District Court for the Southern District of Alabama at Mobile, William Brevard Hand, J., instructed, over defendant's objection, that defendant's alleged reasons for receiving the firearm were to be disregarded. Defendant was convicted. Defendant appealed. The Court of Appeals, Roney, Circuit Judge, held that where defendant admittedly had purposely approached a man with a gun and had taken possession of the gun, and had retained possession for approximately ten minutes after reentering a bar, and did not attempt to rid himself of the gun until police officers entered the bar, the trial court did not err in refusing requested instructions and instead charging that the reason for defendant's receipt of the firearm was "not part of the equation" or in replying, in answer to a subsequent inquiry from jury, that the jury was to arrive at a decision "Strictly by the law."

Affirmed.

1. Criminal Law ⇐770(2), 1144.14

Defendant was entitled to have presented instructions relating to any theory of defense for which there was any foundation in evidence though evidence might be weak, insufficient, inconsistent or of doubtful credibility, and thus where defendant complained on appeal of refusal of instruction, case was to be viewed under defendant's version of the facts.

2. Weapons ⇐17(6)

Where defendant admittedly had purposely approached man with gun and had taken possession of gun, and had retained possession for approximately ten minutes after reentering bar, and did not attempt to rid himself of gun until police officers entered bar, trial court did not err, at trial on charges of receipt of firearm by convicted felon, in refusing requested instructions and instead charging that reason for defendant's receipt of firearm was "not part of the equation" or in replying, in answer to subsequent inquiry from jury, that jury was to arrive at decision "Strictly by the law." 18 U.S.C.A. §§ 922(h), (h)(1), 925, 2312; 26 U.S.C.A. (I.R.C.1954) § 5861(d); 18 U.S.C.A. App. § 1202(a).

Appeal from the United States District Court for the Southern District of Alabama.

Before TUTTLE, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Defendant John Hammons appeals his conviction under 18 U.S.C.A. § 922(h) for illegal receipt of a firearm by a convicted felon.[1] At trial, he admitted receiving the firearm, but alleged that he had acted only to protect the safety of another. The trial court, over defendant's objection, instructed the jury to disregard defendant's alleged reasons for receiving the firearm. On this appeal defendant contends that § 922(h) does not impose on convicted felons absolute liability for receiving firearms but that the jury should have been allowed to consider the circumstances surrounding his receipt of the gun. We need not decide whether § 922(h) renders criminal the receipt of a firearm by a convicted felon in every emergency or allegedly innocent circumstance. We hold only that under the facts of this case the trial court's jury instruction did not constitute reversible error.

[1] We must view this case under defendant's version of the facts, for "defendant [was] entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972), *quoting Tatum v. United States*, 88 U.S.App.D.C. 386, 391, 190 F.2d 612, 617 (1950).

In August 1973 defendant was convicted of interstate transportation of a stolen motor vehicle and sentenced to three concurrent terms of three years imprisonment.[2] On June 10, 1976, defendant, while on probation under this conviction, was with Connie Floyd and Melvin Lee at "Ye Old Spot," a nightclub in Pritchard, Alabama. At approximately 3:00 a.m., Hudson Bridges, a friend of defendant, entered the club, looking for his girlfriend Pat Townley. When Townley refused to leave the club, Bridges retrieved a pistol from his car, returned to the club, and forcefully escorted Townley outside. Defendant, aware of Bridges' reputation for violence, followed the couple outside "to keep [Bridges] from hurting [Townley]."

Defendant persuaded Bridges to hand over the gun and reentered the club with the gun still in his possession. When two police officers entered the club approximately 10 minutes later, defendant attempted to give the gun to a waitress with whom he had been talking. During the exchange, however, the gun went off, shooting defendant in the buttocks.

Five months later defendant was charged with violating 18 U.S.C.A. § 922(h)(1), which makes it unlawful for a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." At the close of the trial, defendant requested several jury instructions which, in essence, charged (1) that the jury could consider the circumstances surrounding defendant's receipt of the

1. It shall be unlawful for any person—
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
(2) who is a fugitive from justice;
(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or
(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;
to receive any firearm or ammunition which has been shopped or transported in interstate or foreign commerce.
18 U.S.C.A. § 922(h).

2. 18 U.S.C.A. § 2312 provides:
Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

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gun and (2) that if defendant had gained temporary control of the gun under a reasonable fear for the life and safety of another, the jury should vote for acquittal. The trial judge denied the requested instructions and charged the jury as follows:

> [T]o receive a firearm, as that term is used, means to take possession of or to knowingly accept the same. The reason for receiving the firearm is not part of the equation and you are not to burden yourselves in trying to determine why the firearm was received, if in fact it was.

Defendant's objection to this instruction was overruled, and the jury retired. After a period of deliberation, the jury sent the judge a note inquiring: "In arriving at the decision, should we (1) consider the circumstances as to how he acquired the gun, or (2) strictly by the law?" Over defendant's objection, the court replied, "Strictly by the law." After further deliberation, the jury indicated that it was unable to reach a verdict and requested that the law be read again. The court read its charge relative to the statute and again instructed the jury that they were not to burden themselves in trying to determine why the firearm was received. The jury returned a verdict of guilty, and defendant was sentenced to two and one-half years imprisonment.

Defendant does not contend that the Government must prove, as an element of the offense under § 922(h), that defendant received the gun without legal excuse.[3] Rather, he argues that the trial court erred in refusing to allow the jury to consider, as a defense, the circumstances attending defendant's receipt of the weapon. Defendant urges that Congress could not have intended criminally to punish a felon who receives a firearm under emergency conditions not of his own making. The Government maintains that the absolute language of § 922(h) admits of no exceptions: a convicted felon violates the law when he receives a firearm, regardless of how innocent or exigent the circumstances.

Section 922(h) prohibits, in absolute terms, the receipt of a firearm by a convicted felon. Section 925 details the limited exceptions to liability under § 922(h). As the Supreme Court has noted, Congress "sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means." *Barrett v. United States*, 423 U.S. 212, 218, [96 S.Ct. 498, 502, 46 L.Ed.2d 450] (1976). The question presented by defendant's contentions, therefore, is whether a defense of emergency or exigent circumstances to be judicially read into the otherwise unambiguous terms of the statute. We need not here decide whether some set of facts may sometime be held to present such a defense, although to date no court has constructed such a defense. We only hold that the facts of this case do not demonstrate a legal defense to the charge.

[2] Defendant admits that he purposefully approached Bridges and took possession of the gun. Moreover, defendant retained possession of the firearm for approximately 10 minutes after reentering the bar, an act which is itself an apparent violation of federal gun control legislation. *See* 18 U.S.C.A.App. § 1202(a). Finally, not until police officers entered the club did defendant attempt to rid himself of the gun, and then he apparently tried to conceal the transfer from the officers. Defendant's continued possession of the gun after the alleged emergency conditions had vanished and the surreptitious manner in which he attempted to transfer it were hardly consistent with his theory of justified or innocent receipt of the firearm. On the whole, the record in this case does not support defendant's contention that the trial court erred in instructing the jury as it did. We express no opinion on whether a different set of facts might support the judicial creation of such a defense to § 922(h).

AFFIRMED.

3. This argument as to a similar statute was rejected in *United States v. Parker*, slip opinion 2030, — F.2d — (5th Cir. 1978) [No. 77 5384, Feb. 6, 1978], which was orally argued at the same time as this case. Defendant Parker was convicted under 26 U.S.C.A. § 5861(d) for possession of an unregistered sawed-off shotgun. At trial Parker contended that his possession was justified by exigent circumstances. On appeal Parker argued, in effect, that in order to prove "knowing" possession, the Government must prove that defendant's possession was not justified by some innocent reason. We held that the Government need only show that defendant willfully and consciously possessed what he knew to be a firearm.

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United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
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600 CAMP STREET
NEW ORLEANS, LA. 70130

March 8, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5262 - U.S.A. v. JOHN CORNELIUS HAMMONS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Brenda M. Hauck
Deputy Clerk

*on behalf of the appellan John Cornelius Hammons,

bmh

cc: Mr. Gregory Hughes
Messrs. W. A. Kimbrough, Jr.
J. B. Sessions, III

Supreme Court, U. S.
FILED
JUL 11 1978
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No. 77-6536

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

JOHN CORNELIUS HAMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ORIGINAL COPY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6536

JOHN CORNELIUS HAMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his conviction for receiving a firearm should be set aside because Congress did not intend to prohibit the temporary receipt of a firearm by a convicted felon where the felon has sought to prevent misuse of that firearm by another person.

1. Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was convicted of receiving a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(h)(1). He was sentenced to two and a half years' imprisonment.[1/] The court of appeals affirmed (Pet. App.; 566 F.2d 1301).

1/ This sentence was to be served concurrently with the remainder of the sentence imposed under the prior federal conviction -- an August 3, 1973, conviction for interstate transportation, receipt and concealment of a stolen motor vehicle, in violation of 18 U.S.C. 2312 and 2313. At that time, petitioner was sentenced to a term of three years' imprisonment, and ordered to serve six months of this sentence; the balance was suspended upon the condition that he remain on probation for two years and six months. Prior to the expiration of his probation period, petitioner was prosecuted for the present offense. At the conclusion of the trial in this case a probation revocation hearing was held and petitioner's probation was revoked. The basis for the revocation of his probation was the present conviction and a conviction in a state case for driving while intoxicated. Petitioner does not here challenge the revocation of his probation.

The evidence, as summarized by the court of appeals, showed that on June 10, 1976, petitioner went to a nightclub in Prichard, Alabama. At approximately 3:00 a.m., Hudson Bridges, a friend of petitioner's, entered the club, looking for his girlfriend Pat Townley. When Townley refused to leave the club, Bridges obtained a pistol from his car, returned to the club, and forcibly escorted Townley outside. Petitioner followed the couple outside and persuaded Bridges to hand over the gun. He then reentered the club with the gun still in his possession. Upon the arrival of two police officers approximately ten minutes later, petitioner attempted to give the gun to a waitress with whom he had been talking. During the transfer of the gun it went off and shot petitioner.

On July 16, 1976, in the City Court of Prichard, petitioner was convicted of discharging a firearm within the city limits and was fined $100 (Case No. 82519). He appealed his conviction to the Circuit Court of Mobile County, which dismissed the charge on August 30, 1976. Petitioner was subsequently indicted and convicted in federal court for violation of 18 U.S.C. 922(h).

2. As explained in Rinaldi v. United States, No. 76-6194, decided November 7, 1977, the Department of Justice has adopted a formal policy of declining to prosecute individuals for acts forming the basis for a prior state prosecution, except where the second prosecution would advance compelling interests of federal law enforcement, and then only after specific approval by the appropriate Assistant Attorney General, and the Attorney General. The federal prosecution in this case was not authorized as

required by the formal policy of the Department of Justice. Upon full consideration of the pertinent facts, we have determined that there were no compelling reasons for the federal prosecution. Therefore, in accordance with the government's policy against successive state and federal prosecutions in the circumstances presented here, we respectfully request the Court to grant the petition, vacate the judgment of the court of appeals, and remand the case to the district court with instructions to grant the government's motion to dismiss the indictment. See Rinaldi v. United States, supra; Frakes v. United States, No. 77-5742, decided March 6, 1978.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

JULY 1978.